IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THOMAS R. HUTCHINSON, DENNIS P. BULLARD, ROBERT J. BULLARD, BARBARA L. LAWRENZ, RUTH ANN LIBBY, KATHRYN M. ROBINSON, JOHN M. SPANTON, Plaintiffs	)	
vs.	)	D.C. No. 02-C-408-E
RICHARD BRADY PFEIL; MARY JOAN PFEIL; LEWIS N. CARTER; DOERNER, STUART, SAUNDERS, DANIEL & ANDERSON, L.L.P.; SCOTT E. HERSHMAN; BARRETT W. FREEDLANDER, Defendants.	)	

ORDER

Now before the Court is the Motion to Dismiss Amended and Supplemental Complaint (docket #30) of the Defendant, Scott E. Hershman, the Motion to Dismiss (docket #33) of the Defendant Barrett W. Freedlander, the Motion to Dismiss or Strike Amended and Supplemental Complaint (docket #32) of the Defendants Richard Brady Pfeil and Mary Joan Pfeil, and the Motion to Dismiss (docket #34) of the Defendants Lewis N. Carter and Doerner, Stuart, Saunders, Daniel & Anderson, L.L.P.

Plaintiffs, descendants of the heirs of American Impressionist Theodore Robinson, have been trying, since 1994, to recover an oil painting, which they refer to as "the unfinished "E.M.J. Betty'" from its current owners, Richard Brady Pfeil and Mary Joan Pfeil. In the 1994 action, *Thomas R. Hutchinson, Anne E. Hutchinson, Dennis P. Bullard, Robert J. Bullard, Sharon E. Colegrove, Jody L. Hartzler, Barbara L. Lawrenz, Ruth Ann Libby, Kathryn M. Robinson, and John M. Spanton, plaintiffs, versus Richard Pfeil and Mary Jo Pfeil, defendants,* case number 94-C-1134-E, plaintiffs demanded return of the painting, on the theory that it had been stolen from the artist's estate.[1] By Order of March 9, 1998, this Court granted summary judgment to defendants, holding that plaintiffs' claims were barred by laches and the statute of limitations. The Order granting summary judgment was affirmed on appeal in *Hutchinson v. Pfeil,* No. 98-5248 (10th Cir. April 4, 2000) (unpublished). Plaintiffs now seek to set aside the Court's Order granting summary judgment on the basis that it was procured by fraud upon the Court. In addition, Plaintiffs bring claims against Defendants for conversion and civil conspiracy, negligent supervision, attorney deceit and collusion, and violation of RICO.

Defendants have filed a host of motions to dismiss, arguing that plaintiffs fail to state a claim, that their claims are

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[1] Plaintiffs claim that the unfinished painting was stolen from the artist's studio, given a forged signature and date, surreptitiously returned to the collection to hide the unauthorized sale of another painting, and then, apparently stolen again, because it does not have a Theodore Robinson estate sale stamp on its back.

barred by statutes of limitatios, and that their claims are time barred. Plaintiffs, of course, ispute these allegations.

Legal nalysis

Plaintiffs correctly pint out that, in considering a motion to dismiss for failureo state a claim, a court "must accept as true all factual allegiions in the complaint, construe them in a light most favorabl to the plaintiff, and resolve all reasonable inferences in plainiff's favor." *Seamons v. Snow*, 84 F.3d 1226, 1231-32 (10th Cir. 1996). Notwithstanding *Seamons*, the Court must evalate the allegations in plaintiffs' amended complaint in light ofommon sense and existing law.

The Court will firstturn to the issue of whether Plaintiffs' Complaint states alaim for fraud on the court. In arguing that there was fraud n the court, Plaintiffs take the same position they took inthe previous case: that the unfinished "E.M.J. Betty" is sbject to replevin because it was stolen from the artist's estate, nd that the claim for replevin is not barred either by laches orthe statute of limitations. The gravamen of Plaintiffs' claim ; that Lewis Carter, attorney for the Pfeils in the underlying cas, committed fraud on the Court when he argued in his motin for summary judgment that Plaintiffs' claims were barre by laches and the statute of limitations, because he knewor should have known that the defenses of laches and the statte of limitations were not valid defenses. It is important to not that Plaintiffs fraud claim does not rely on any new argument and does not point to any facts that were unknown or obscued at the time the decision on summary judgment was rendered. In other words, Plaintiffs rely on the exact same arguments and interpretation of the record to defeat the defenses olaches and statute of limitations in this case that they relied n in the underlying case. In

essence, by labelling counsel's conduct as "fraud" Plaintiffs are seeking another opportunity to prevail on their claim using arguments identical to the ones that were rejected by this Court and the Court of Appeals. If Plaintiffs were allowed to proceed with their "fraud" claim, every litigant would have the opportunity to "reopen" final judgments simply by characterizing opposing counsel's argument as fraudulent or misleading. Common sense dictates that a claim for fraud requires something more. There must be some behavior in addition to the mere advancement of a legal argument.

A review of *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944) and *Robinson v. Audi Aktiengesellschaft*, 56 F.3d 1259 (10th Cir. 1995) shed light on what that "something more" must be. The Court in *Robinson* summarized the facts in *Hazel-Atlas Glass* as follows:

> In that case, attorneys and agents of respondent Hartford, in order to help Hartford obtain a patent, had prepared and submitted a spurious trade journal article to the U.S. Patent Office. Hartford's application for the patent was granted, and Hartford later brought suit against petitioner Hazel-Atlas alleging infringement of the patent. A lower court found no infringement. The case was then appealed to the circuit court. In the course of the appeal, one of the attorneys who had played a part in getting the spurious article published referred the circuit court to the article. Relying in part upon the article, the circuit court concluded that the patent was valid and reversed the judgment. Hazel-Atlas then brought an action in the circuit court setting forth the circumstances surrounding the use of the spurious article and requesting relief from the judgment. The circuit

> court refused to grant relief, however, citing among other things, a lack of diligence on Hartford's part and a belief that the court has no power to set aside a judgment after the end of the term of court at which the judgment was entered.
>
> On appeal from that ruling, the Supreme Court held that federal courts have inherent equitable power to grant relief in cases of after-discovered fraud regardless of the "end of term rule," and concluded that "every element of the fraud here disclosed demands the exercise of the historic power of equity to set aside fraudulently begotten judgments."

56 F.3d at 1266 (quoting *Hazel-Atlas Glass,* 322 U.S. at 245-46).

This analysis of *Hazel-Atlas Glass* reveals that the alleged fraud in this case is different from that in *Hazel-Atlas Glass* in two very important respects. First, the fraudulent conduct in *Hazel-Atlas Glass* was based on the attorney's involvement in the preparation and submission to the U.S. Patent office of a spurious trade journal article. Second, the fraud in Hazel was discovered after the judgment was entered. In the present case, the only alleged fraud is in the framing of and making arguments to the Court. Moreover, Plaintiffs controverted Defendants' defenses in the 1994 case using the exact same arguments they now use to demonstrate fraud. In addition, the Court had before it, in the 1994 case, the law and the factual record, and did review both at length before making a ruling. There is nothing "after discovered" here. Plaintiffs' allegations, taken as true, simply do not constitute actionable "fraud on the court," as described in *Hazel-Atlas Glass.*

In light of the dismissal of Plaintiffs' "fraud on the court" claim, Plaintiffs' claims for conversion and civil conspiracy, negligent supervision, and attorney deceit and

collusion, and violation of RICO must also fail. These claims, like the "fraud on the court" claim, are nothing more than an attempt to re-litigate the 1994 case by putting new labels on the same claims.

Defendants request monetary sanctions as well as filing restrictions against Plaintiffs. The Court declines to consider monetary sanctions at this time. The parties are not, however, precluded from raising this issue again, at the conclusion of any appeal, or after the time has run for perfecting an appeal, if Plaintiffs choose not to pursue an appeal. With respect to filing restrictions, the Court must conclude, based on this thinly veiled attempt for another bite at the apple of recovery of the "unfinished E.M.J. Betty," as well as the record in this case and the related cases in this jurisdiction, that Plaintiffs' counsel is "an individual who simply refuses to accept the judgments of the courts." *Stafford v. United States,* 208 F.3d 1177, 1178 (10th Cir. 2000). Accordingly, in an attempt to streamline this matter that has dragged on far longer than necessary, Plaintiffs are directed not to file any pleading in this case which would seek this Court's reconsideration or revisiting of the issues decided in this Order.

The Motion to Dismiss Amended and Supplemental Complaint (docket #30) of the Defendant, Scott E. Hershman, the Motion to Dismiss (docket #33) of the Defendant Barrett W. Freedlander, the Motion to Dismiss or Strike Amended and Supplemental Complaint (docket #32) of the Defendants Richard Brady Pfeil and Mary Joan Pfeil, and the Motion to Dismiss (docket #34) of the Defendants Lewis N. Carter and Doerner, Stuart, Saunders, Daniel & Anderson, L.L.P. are **GRANTED.** The Motion to Deem Motion to Dismiss Confessed (docket #36) of Defendant Hershman, the Motion to strike Plaintiffs' Combined Response to Motions to Dismiss (docket #40) of Defendant Hershman, the Motion for Rule 11 Sanctions (docket #49) of the Defendant Pfeils, the Motion to Certify Questions (docket #52) of the Plaintiffs, and the Motion to Strike Motion for Sanctions, and for Sanctions or Attorney Fees (docket #55) of the Plaintiffs are **DENIED AS MOOT.**

Plaintiffs are directed not to file any pleading in this case which would seek this Court's reconsideration or revisiting of the issues decided in this Order.

IT IS SO ORDERED THIS 6th DAY OF MARCH, 2003.

s/ James O. Ellison
JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT